Supreme Court, U.S.
FILED
MAY 14 1992
OFFICE OF THE CLERK

(3)

No. 91-1497

In The

Supreme Court Of The United States

October Term, 1991

JIM JOINER; JOHN MILNER
Petitioners,

v.

MAYOR JIM ROBERTS AND COUNCILPERSONS TERRY SCOTT, JOYCE GILLARD, VIOLET RAGLAND, TRUMAN CRANE AND BILL PARRISH, IN THEIR OFFICIAL CAPACITIES AS THE DULY ELECTED OFFICERS OF THE TOWN OF MORRIS, ALABAMA
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

REPLY BRIEF TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Alabama Supreme Court's decision conflicts with the decisions of the United States Supreme Court applicable to the discharge of petitioners from their tenured public employment without notice or a hearing?

II. Whether petitioners now seek to advance arguments that were not made to the Alabama Supreme Court?

III. Whether there are other grounds, not asserted or relied upon by the Alabama Supreme Court in its decision, which would support that decision and thereby justify the denial of the Petition?

IV. Whether the Alabama Supreme Court's decision has a broad and limiting effect upon due process of law by imposing upon the petitioners, and all other citizens of Alabama seeking redress under 42 U.S.C. § 1983, the impermissible requirement of exhaustion of administrative remedies that may be provided or required by state law or municipal ordinance?

PARTIES TO THE PROCEEDING

The parties to the proceedings below are listed in the Petition, and the respondents have adopted the petitioners' listing of the parties.

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STATUTES INVOLVED

This case involves U.S. Const. Art. VI cl. 2, U.S. Const. amend. I, U.S. Const. amend. XIV, 42 U.S.C. § 1983 and Ala. Code § 11-43-160. Pertinent portions of these provisions are reprinted in the petition for writ of certiorari at A.58-62.

STATEMENT OF THE CASE

Respondents' assertion that the petitioners' statement of the case "embellishes" the facts, and that petitioners' facts are unsupported by the record, is devoid of merit. If petitioners "embellished" any fact, or stated any unsupported fact, respondents would have cited such fact and rebutted it. They did not.

Petitioners' statement of the case in the petition for writ of certiorari omitted citations to the record below because that type of citation was not used in the sample petition made available to the petitioners by the clerk of this Court.[1] In the Appendix hereto, petitioners have reprinted their original statement of the case, with the relevant citations to the record below. A.1-8.

Respondents list a number of "problems" and imply that those "problems" were reasons for the petitioners' discharge. Resp.Br. 8-9. Mayor Lamar Reid, however, testified at trial that, in his opinion, the respondents cut the petitioners' pay and took away petitioner Joiner's insurance in retaliation for petitioners reporting the improper tire purchases by councilmen Chambers and Keith. (RT 571-578). The Alabama Supreme Court stated that petitioners presented "substantial evidence" that they had been discharged in retaliation for reporting the improper tire purchases. *Roberts v. Joiner*, 590 So.2d 195, 202 (Ala. 1991). Mayor Reid's testimony also confirmed that the petitioners were not discharged for the purported "problems" cited by respondents in their brief, and that respondents did not notify the petitioners of any specific charges being leveled against petitioners. (RT 531-578; Joint Exhibit 10). Mayor Reid also testified that petitioners were doing a good job as police officers. (RT 493, 545).

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[1] As used herein, citations to the petition for writ of certiorari are identified as "Pet."; citations to the Appendix to the petition for writ of certiorari are identified as "Pet.A."; citations to the Reporter's Transcript of the trial below are identified as "RT"; and, citations to the respondents' brief in opposition to the petition for writ of certiorari are identified as "Resp.Br.".

Petitioners, in their original statement of the case and in the foregoing paragraphs, have already cited the Court to the following facts: (a) petitioners could be fired only for cause and, therefore, had a property interest in their public employment (RT 47-51, 282-284, 502-502, Joint Exhibit 6, Pet.A.51-51); (b) petitioners were doing a good job as police officers for respondents (RT 493, 545-546); (c) the respondents' retaliation against the petitioners started when petitioners notified Mayor Lamar Reid of the improper tire purchases by two of the councilmen, not when the proposed 1984 budget was cut (RT 68-72, 287, 294-295); (d) respondents discharged petitioners for an impermissible retaliatory purpose (RT 114-115, 577-578) *Roberts,* at 202; (e) prior to the discharge, respondents did not notify petitioners of any specific charges being brought against petitioners, and did not provide petitioners an opportunity to respond to any specified allegations of wrongdoing (RT 129, 145, 147, 165-166, 222, 301, 304-306); and (f) Mayor Lamar Reid made the decision to discharge petitioners before the March 29, 1984 commission meeting, without notifying petitioners of the charges against them or providing them an opportunity to respond (RT 498).

Finally, many of the "facts and issues" cited by respondents in their brief are of the type that they argued unsuccessfully in the trial court: they are merely frivolous attempts to distract this Court from the substantive issues in this case. It didn't work with the jury; it didn't work with the trial judge; and, it shouldn't work here. A good example of this strategy is the respondents' reference to the showing of "x-rated" movies at the city hall. Resp.Br. 3-4. Yet, there is no evidence in the record that "x-rated" movies had anything to do with the firing of the petitioners. In fact, the record shows that neither of the petitioners were even present when the movies were shown. (RT 247-248, 355). Nevertheless, respondents believe it is in their interest to tell this Court that there were "x-rated" movies shown at the town hall while petitioners were employed as police officers for the town. The fact that respondents believe

it to be in their interest to cite such irrelevant facts typifies the poverty of their arguments.

REASONS FOR GRANTING THE WRIT

As set forth herein, and in the petition for writ of certiorari, the Alabama Supreme Court's decision impermissibly restricts the pretermination process due petitioners and all other Alabama tenured public employees under the Fourteenth Amendment. By its decision, the Alabama Supreme Court has authorized the state and its political subdivisions to discharge their tenured employees without first providing them notice of the charges against them and an opportunity to respond to the charges.

I.

CLEVELAND BOARD OF EDUCATION V. LOUDERMILL, 470 U.S. 532 (1985), DID NOT EXPAND OR SUBSTANTIVELY CHANGE THE LAW APPLICABLE TO PETITIONERS' DUE PROCESS CLAIMS, AND *PARRATT V. TAYLOR*, 451 U.S. 527 (1981) WAS NOT LEGAL PRECEDENT WITH RESPECT TO PETITIONERS' DUE PROCESS CLAIMS

As set forth in the petition for writ of certiorari (Pet.13-19), and discussed at item III *infra*, petitioners were tenured public employees who had a property interest in their employment at the time of their discharge on March 29, 1984. The petitioners claim that they were entitled to receive notice of the charges against them, and an opportunity to respond to the charges, prior to being discharged. Contrary to respondents' assertion and the decision of the Alabama Supreme Court, this Court's decision in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985) did not expand, or substantively change, the law applicable to the petitioners' due process claims. In *Loudermill*, this Court expressly stated:

> An essential principle of due process is that a deprivation of life, liberty, *or property* "be *preceded* by notice *and* an opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (emphasis added). We have described the "root requirement" of the Due Process Clause as being "that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest." *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) (emphasis in original); see *Bell v. Burson*, 402 U.S. 535, 542 (1971). This principle requires "some kind of a hearing" *prior* to the discharge of an employee who has a constitutionally protected interest in his employment. *Board of Regents v. Roth*, 408 U.S., at 569-570; *Perry v. Sindermann*, 408 U.S. 593, 599 (1972) (emphasis added). As we pointed out last Term, ***this rule has been settled for some time now.*** *Davis v. Scherer*, 468 U.S. 183, 192 (1984) (emphasis added).

470 U.S. at 542.

Loudermill was an affirmation of long-settled principles of due process, not an expansion of or a departure from those principles, as argued by respondents. The respondents, therefore, err in asserting that *Loudermill* would have to be applied retroactively in order for petitioners to be entitled to receive notice of the charges against them and an opportunity to respond prior to being discharged.

The respondents' also err in asserting that *Parratt v. Taylor*, 451 U.S. 527 (1981) was dispositive of the petitioners' due process claims at the time they were discharged. The due process claim in *Parratt* arose from a prison guard's unintentional loss of a prisoner's $23.50 hobby kit in 1976 or earlier. The due process claim in *Loudermill* arose from the November 3, 1980 summary discharge of a tenured public employee, who was not notified of the charges of dishonesty leveled against him and who was not provided an opportunity to respond to the charges prior to being discharged. The due process claim in the case at bar arose from the March 29, 1984 summary

discharge of petitioners, who were not notified of the charges against them and given an opportunity to respond to the charges prior to being discharged. In addition, the Alabama Supreme Court determined that petitioners established by substantial evidence that they were discharged in retaliation for lawfully exercising their rights of speech under the First Amendment of the U. S. Constitution.

If *Parratt* was dispositive of the petitioners' due process rights at the time they were discharged, then this Court would have applied the same reasoning and result to its determination of the complainant's due process rights in *Loudermill*. This Court, however, distinguished *Loudermill* from *Parratt* due to the dissimilar property interests involved, the differing intent by the government agencies responsible for the property deprivations, and the relative practicalities of providing predeprivation notice and a hearing. For the reasons stated above, and in the petition for writ of certiorari, *Parratt* is equally inapposite to the petitioners' due process claims.

Respondents citation of *Cafeteria and Restaurant Workers, Local 473 v. McElroy*, 367 U.S. 886 (1961), is inapposite. Resp.Br. 15. The complainant in that case, Rachel Brawner, was a short order cook employed by a private corporation. *Id.* at 887. Unlike petitioners in the case at bar, Ms. Brawner was not a tenured public employee with a property interest in her job, and she was not discharged in retaliation for lawfully exercising her rights of speech under the First Amendment.

Respondents citation of *Goolsby v. City of Montgomery*, 805 F.2d 1008 (11th Cir. 1986), is also inapposite. Resp.Br. 19, 24. The complainant in that case, Donald Goolsby, was a permanent status sanitation supervisor for the City of Montgomery, Alabama. *Id.* at 1009. Mr. Goolsby was discharged from his position after being convicted of the criminal charge of defrauding the City of Montgomery. *Id.* at 1009-10. Unlike petitioners in the case at bar, Mr. Goolsby was not discharged in retaliation for lawfully exercising his rights of speech under the First Amendment.

Respondents citation of *Lee v. Hutson*, 810 F.2d 1030 (11th Cir. 1987), is also inapposite. Resp.Br. 19, 24. The complainant in that case, Jaxie Lee, was a tenured employee of the Cobb County, Georgia Sheriff's Department. *Id.* Ms. Lee was charged with disseminating criminal records without authorization and discharged. *Id.* Unlike petitioners in the case at bar, Ms. Lee was not discharged in retaliation for lawfully exercising her rights of speech under the First Amendment:

> *In the absence of any claim that the public employer was motivated by a desire to curtail or penalize the exercise of employee's constitutionally protected rights*, we must presume that official action was regular and, if erroneous, can best be protected in other ways.

Lee, at 1032 (emphasis added); *citing Bishop v. Wood*, 426 U.S. 341, 349-50 (1976). In the case at bar, the Alabama Supreme Court found "substantial evidence" that the petitioners were discharged for lawfully exercising their rights of speech under the First Amendment. *Roberts v. Joiner*, 590 So.2d 195, 202 (Ala. 1991).

II.

ASSUMING, *ARGUENDO*, THAT THIS COURT'S DECISION IN *CLEVELAND BOARD OF EDUCATION V. LOUDERMILL*, 470 U.S. 532 (1985) CHANGED THE LAW WITH RESPECT TO DUE PROCESS IN THE DISCHARGE OF A TENURED PUBLIC EMPLOYEE, PETITIONERS CITED AND ARGUED *LOUDERMILL* IN THE APPEAL TO THE ALABAMA SUPREME COURT AND, THEREFORE, ARE NOT PRESENTING ARGUMENTS TO THIS COURT THAT WERE NOT MADE TO THE ALABAMA SUPREME COURT

Even assuming, *arguendo*, that retroactive application of *Loudermill* was apposite to the proceedings below, respondents' statement that petitioners "did not present" that argu-

ment to the Alabama Supreme Court is incomplete and misleading. Petitioners specifically cited *Loudermill* on page 28 of their brief on appeal to the Alabama Supreme Court, for the proposition that petitioners were tenured public employees who were entitled to receive notice of the charges against them and a hearing prior to their discharge. Petitioners also argued *Loudermill* at length on pages 14-19 in their application and brief for rehearing to the Alabama Supreme Court. (Pet.11-12, 19-21.)

Respondents citation of *Head v. New Mexico Bd. of Exam. in Optometry*, 374 U.S. 434 (1963), is inapposite. Resp.Br. 20. In that case, the appellants' "free speech" argument was not "set forth in the notice of appeal [in the state courts] or fairly comprised therein. . . ." *Id.* at 432-433 n. 12. As set forth above, and in the petition for writ of certiorari, petitioners specifically cited and argued *Loudermill* to the Alabama Supreme Court.

III.

THE OTHER GROUNDS CITED BY THE RESPONDENTS ARE NOT SUPPORTED BY THE APPLICABLE LAW AND FACTS OF THE ACTION BELOW AND, THEREFORE, THOSE GROUNDS DO NOT SUPPORT THE DECISION OF THE ALABAMA SUPREME COURT

A. *Respondents did not notify petitioners of the charges against them, nor provide them an opportunity to respond to the charges, prior to discharging them.*

The trial testimony of petitioners and Mayor Lamar Reid confirmed that respondents discharged petitioners without first notifying petitioners of any specific charges against them or providing them an opportunity to respond. (RT 129, 145, 147, 165-166, 222, 301, 304-306). The decision of the Alabama Supreme Court further confirms the fact that petitioners did not receive a pretermination hearing, by holding that petition-

ers were entitled to received only a post-termination hearing as provided under state law. *Roberts v. Joiner*, 590 So.2d 195 (Ala. 1991).

B. Loudermill *did not "articulate for the first time" the applicable standards of due process, nor were the post-deprivation remedies adequate to provide due process.*

As set forth at item I above, and at length in the petition for writ of certiorari (Pet.19-21), *Loudermill* did not "articulate for the first time" the "essential principle of due process . . . that a deprivation of . . . property `be *preceded by* notice and an opportunity for hearing appropriate to the nature of the case.'" *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (emphasis added); *see also Boddie v. Connecticut*, 401 U.S. 371, 379 (1971); *Bell v. Burson*, 402 U.S. 535, 542 (1971); *Board of Regents v. Roth*, 408 U.S., at 569-570; *Perry v. Sindermann*, 308 U.S. 593, 599 (1972).

C. *Under the provisions of state and federal law, and the express terms of respondents' written personnel policy, petitioners were tenured public employees who had a property interest in their jobs and were not employees at will.*

Respondents' assertion that petitioners Joiner and Milner were employees at will is an egregious misrepresentation of the law and facts. As set forth at length in the petition for writ of certiorari, petitioners had a property interest in their public employment and, without question, were not employees at will. Pet.13-19.

Both petitioners were nonprobationary, "permanent status" employees, as defined by respondents' personnel policy, who had "*a right to hold [their jobs] permanently*, conditioned upon [their] continued satisfactory performance, honest, loyalty and the Town's ability to finance services. . . . " (emphasis added). Pet.A.51-52. Petitioners could be discharged only "for cause" and, therefore, had a property interest in their continued employment. *Board of Regents of State Colleges v. Roth*, 408

U.S. 564, 569-570, 576-578 (1972); *Perry v. Sindermann*, 408 U.S. 593, 599, 601 (1972); *Cf. Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982).

In addition, because petitioner Joiner was the police chief of the Town of Morris, he had an absolute right under Alabama to be discharged only for cause and only *after* being provided a hearing by the council of the Town of Morris. *Ala. Code* § 11-43-160 (1975). Pet.A.62.; *Godwin v. City Council of the City of McKenzie*, 449 So.2d 1231, 1232 (Ala. 1984).[1] Both petitioners, therefore, had a property interest in their continued public employment and were entitled to receive a pretermination hearing. *See Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 569-570, 576-578 (1972); *Fetner v. City of Roanoke*, 813 F.2d 1183, 1185-86 n.7 (11th Cir. 1987); *City of Huntsville v. Biles*, 489 So.2d 509, 511-512 (Ala. 1986).

IV.

THE DECISION OF THE ALABAMA SUPREME COURT ADVERSELY IMPACTS ALL ALABAMA TENURED PUBLIC EMPLOYEES BECAUSE IT AUTHORIZES THE STATE OF ALABAMA AND ITS POLITICAL SUBDIVISIONS TO DISCHARGE TENURED EMPLOYEES WITHOUT FIRST PROVIDING THEM NOTICE OF THE CHARGES AGAINST THEM AND AN OPPORTUNITY TO RESPOND TO THE CHARGES

For the thousands of tenured public employees throughout the state of Alabama, the decision in *Roberts v. Joiner*, 590 So.2d 195 (Ala. 1991) is certainly not "narrow" in its application, as stated by the Alabama Supreme Court. *Id.* at 201. *Roberts* has

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[1] On March 2, 1984 the Alabama Supreme Court held that a city's police chief "... could be discharged only *after* a 'for cause' hearing by the City Council, as provided by § 11-43-160." *Godwin v. City Council of the City of McKenzie*, 449 So.2d 1231, 1232 (Ala. 1984) (emphasis added). The court decided *Godwin* almost a month prior to the time that the Town of Morris discharged the petitioners without provided them a pretermination hearing.

not been overruled or distinguished in any subsequent decisions by the Alabama Supreme Court. Under *Roberts*, the tenured employees of Alabama's state and local governments are now subject to state-sanctioned deprivation of their rights of due process under the Fourteenth Amendment and their remedies under 42 U.S.C. § 1983.

CONCLUSION

For the reasons set forth above, and in the petition for writ of certiorari, the petition should be granted.

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APPENDIX

Petitioners' Statement of the Case, From the Petition for Writ of Certiorari, With the Addition of Citations to the Record Below

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STATEMENT OF THE CASE

This case provides the Court with the important opportunity of prohibiting the state from taking the petitioners' vested public employment as police officers without first providing them notice of the charges against them and a hearing on the charges. This case further provides the Court with the opportunity to set right an egregious wrong by restoring to petitioner Milner, a 53 year-old combat veteran, his career as a police officer, which he will otherwise lose forever.[1] And, finally, this case provides the Court with the important and broader opportunity of protecting all of the public employees in Alabama from having their jobs taken by the state without first being provided notice of charges and a hearing on the charges. The Court can accomplish these ends by reversing the decision of the Alabama Supreme Court, which diametrically conflicts with this Court's longstanding decisions holding that a state is required to provide a tenured public employee with notice of charges being brought against him and a hearing on those charges before the state takes his job.

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[1] Due to his termination by the Town of Morris petitioner Milner was unable to obtain work as a police officer with other municipalities. After Milner began his career as a police officer, the State of Alabama enacted legislation prohibiting the hiring of police officers who have not successfully completed a course of training at Alabama's police academy. Police officers who were employed at the time the statute was enacted were "grandfathered" under the act and were permitted to continue their employment. Because Milner is 53 years old, he is prohibited from enrolling in the State of Alabama's police academy. If this Court rules that petitioner Milner was entitled to receive a pretermination hearing, then under the trial court's order Milner will be reinstated to his former position as police sergeant with the Town of Morris. As an active, employed police officer he will then be eligible for employment as a police officer throughout the State of Alabama, without having to complete the state's police certification course.

Petitioner Joiner was hired as police chief of the Town of Morris on August 10, 1978. (RT 42). Under Alabama law, Joiner could be discharged only for cause and only after being provided a hearing by the Town's council.[2]

Petitioner John Milner was hired by the Town as a police sergeant in 1982. (RT 282-283). Milner was hired under the Town's written personnel policy, which is reprinted at A.39-50.[3] The personnel policy stated that new employees would serve a six-month probationary period. A.51. Under the personnel policy, employees attained "permanent employee" status after satisfactorily serving the probationary period. A.51-52. Permanent employees could be fired only for cause. The personnel policy provided a permanent employee with the "right to hold [his or her] job permanently, conditioned upon [his or her] continued satisfactory performance, honesty, loyalty, and the Town's ability to finance services. . . . " A.51-52. Milner successfully completed his probationary period and attained "permanent employee" status, whereupon he was promoted from patrolman to sergeant. (RT 284).

In October of 1983 the Town clerk showed petitioner Milner several invoices from the Goodyear tire store in Birmingham, Alabama.[4] (RT 63, 286-287). Those invoices showed that council members Earl Peyton and Frank Keith, as well as

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[2] *See Ala. Code* § 11-43-160 (1975). A.61.; *Godwin v. City Council of the City of McKenzie*, 449 So.2d 1231, 1232 (Ala. 1984).

[3] The correct Appendix number for the Town's written personnel policy is A.45-56, rather than A.39-50 as shown in the Petition for Writ of Certiorari.

[4] Photocopies of the five tire invoices were attached as Exhibit A to the petitioners' original complaint. The five photocopies were identified as plaintiffs' (petitioners') exhibits one through five at trial, and were admitted into evidence. The petitioners did not have the original tire invoices, and their photocopies of the invoices were of very poor quality. Due to the poor quality of the photocopies, they were not able to be adequately reproduced and reprinted for inclusion in the Appendix hereto. Based upon the testimony at trial, the photocopies of the five tire invoices established that council members Peyton and Keith, and Keith's son, Bobby, had purchased tires through the Town's account for their personal use. (RT 64-66, 86-91, 286-287).

Keith's son, had purchased tires for their personal vehicles under the guise of buying tires for the Town of Morris. By purchasing the tires in the name of the Town, they were able to buy the tires at the substantially discounted price that was available to state and local governmental agencies through the state bid law. A.1-2. By purchasing the tires in the name of the Town, Peyton and the Keiths were also able to avoid paying state and federal taxes on the tires. (RT 69). The net result was that council members Peyton and Keith, as well as Keith's son, Bobby, were able to buy their $170.00 tires for approximately $40.00. (RT 68-69).

Petitioner Milner asked the Town clerk to make copies of the tire invoices, which he then turned over to his immediate supervisor, petitioner Joiner. (RT 287). Joiner took the tire invoices and reported the matter to the mayor, Lamar Reid. A.1-2. (RT 68, 287). Mayor Reid indicated to Joiner that he planned to ask Peyton and Keith to resign from the council. (RT 70-72).

A private meeting of the Town council was held on December 18, 1983 to resolve the tire issue. (RT 101-102). At that meeting it was agreed that council members Peyton and Keith would resign from the committee that purchased goods for the Town, and that they would pay the difference between the price that they actually paid for the tires and the price that they would have paid if they had not bought the tires in the name of the Town. A.2, 33. (RT 101-102).

Following the December 18, 1983 private meeting of the Town council, the mayor called Milner in and told him that the tire matter was over. (RT 294). Later that day, however, council member Keith told Milner that the tire matter was not over, that he was not through with Milner and that things were going to be a lot different regarding the police department. (RT 294-295). Keith said that he planned to take a much larger hand in running the police department than he ever had before. A.27. (RT 294-295).

A few minutes after Keith delivered his warning to Milner, council member Peyton came to Milner and said that the situ-

ation caused by the tire matter was not resolved, regardless of what the mayor had told Milner. (RT 295). Peyton also said that he was going to "get" Joiner and Milner. A.27. (RT 295).

Shortly before January 1, 1984, council member Keith ordered Joiner to find a reason to terminate petitioner Milner. (RT 109). Joiner refused, saying that Milner had not violated the personnel policy nor committed any wrongdoing that would justify terminating him. A.2. (RT 110).

At the next meeting of the Town council on January 10, 1984, Keith made a motion to cut the pay of the Town's full-time employees by five percent. A.2, 35. (RT 111-113). The Town's only full-time employees were petitioners Joiner and Milner, police officer Frankie Witt and the Town clerk, Anna Grooms. A.2. (RT 112). Anna Grooms was the person who originally brought the improper tire purchases to the attention of petitioner Milner. A.2. (RT 286-287). The Town also had part-time employees, but Keith did not seek to cut their pay. A.35. (RT 111-112). Council members Keith, Peyton, Reno and Chambers voted in favor of the pay cut. A.35. Mayor Reid voted against the pay cut. A.35. Petitioners Joiner and Milner were given no notice prior to the meeting that the council would consider a pay cut. (RT 117).

The reason given by the council for the pay cuts at the January 10, 1984 meeting was the Town's purported poor financial condition. A.2. (RT 522-523). Mayor Reid later admitted, however, that the Town was in good financial condition at the time the petitioners' pay was cut. (RT 529, 575). Joiner later informed the council that he thought the pay had been cut because he and Milner had reported the improper tire purchases. A.2. (RT 200). Mayor Reid testified at trial that he believed that Joiner's and Milner's pay was cut in retaliation for their speaking out about the tire purchases. (RT 577-578).

At a council meeting on February 28, 1984, the council decided that the Town should not be paying the health insurance premiums on Joiner's family. A.2-3, 38-39. Prior to the meeting Joiner was given no notice that the council would be

considering whether to pay the insurance premiums. Joiner let the council know that he believed the action had been taken in retaliation for his reporting of the improper tire purchases. A.2-3.

At its meeting on March 13, 1984, the Town council adopted a resolution stating that there was "a problem" existing between the council and the police department. A.3. The resolution stated that the council would allow two weeks to find a solution to "the problems" and then, if no solution was found, the council would "bring its own solution to the table." A.3. The mayor said that the council was publicly recognizing that there was a "problem" between the Town council and the police department, and that the council was willing to meet with the police department during the next two weeks to see if the "problems" could be resolved. A.3. (RT 122-123). Petitioner Milner asked the mayor to explain the resolution, but neither the mayor nor the members of the council would explain what "problem" they were referring to in the resolution. (RT 327-328).

On March 15, 1984, petitioners Joiner and Milner met informally with the mayor and members of the council. A.3. (RT 300-301). Joiner asked for the pay cut to be rescinded. A.3. (RT 129). He also requested that the Town reinstate the health insurance for his family. A.3. (RT 129). The mayor and members of the council did not agree to these requests. A.3. (RT 129).

On March 23, 1984 the complaint initiating this action was filed. A.3. The complaint, with Exhibits B through D, is reprinted at A.26-39.[5] The complaint alleged that Joiner's and Milner's pay had been cut and that Joiner's family health insurance had been terminated in retaliation for reporting the improper tire purchases to the mayor. A.30. The complaint alleged that the actions of the defendants deprived Joiner and

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[5] See n.4 *supra* regarding the explanation for omission from Appendix of Exhibit A to the petitioners' original complaint.

Milner of their property without due process of law and infringed upon Joiner's and Milner's right to free speech under the First Amendment to the Constitution of the United States. A.30. The complaint also asserted causes of action under state law. A.30-31.

The next regularly scheduled meeting of the Town council was held on March 27, 1984. (RT 136). At that meeting the council chamber was full of residents of the Town who were there to express their support for the police officers. (RT 137). Instead of discussing the purported police "problems" in the presence of the residents, the council voted to have a closed meeting immediately following the regularly scheduled meeting. (Joint Exhibit 11). (RT 139). The minutes of the closed meeting reflect that the Town's attorney recommended that the council try to find out how the residents of the Town felt about the matter. (Joint Exhibit 11). The Town's attorney also recommended that petitioners Joiner and Milner be suspended with pay for thirty days. (Joint Exhibit 11). No official action was taken. (Joint Exhibit 11).

Two days later, on March 29, 1984, the plaintiffs were fired at a specially called council meeting. A.4, 40. None of the council members notified petitioners Joiner and Milner of the specially called council meeting. Joiner learned of the meeting when he saw Anna Grooms, the Town clerk, crying at Town Hall on March 29. (RT 141-142). Joiner asked Ms. Grooms why she was crying, whereupon she told him that there was a council meeting that night and that the council was going to fire him. (RT 142). Milner learned about the council meeting when Joiner telephoned him and told him what he had learned from Anna Grooms. (RT 306). The phone call from Joiner was the only notification to Milner that there was going to be a specially called council meeting on the night of March 29, 1984. (RT 306).

When Joiner arrived at the council chamber on the night of the 29th he noticed that it was filled with relatives of the council members. (RT 143-144). When the meeting started, the

mayor read a statement saying that the unspecified "problems" were still existing with the police department, but he did not say what the "problems" were. A.4. (RT 145). The mayor then said he would like to give Joiner and Milner an opportunity to resign. A.4. (RT 146). After the mayor had read the statement, Joiner told the mayor that he would like to know what the charges against him were. (RT 146-147). The mayor's response was "Well, there aren't any really." (RT 147). Joiner then said that he had done nothing wrong and would not resign. A.4. (RT 147). The council then allowed comments from residents and relatives of council members Keith and Peyton.[6] (RT 147-148). The mayor and members of the council then voted to fire petitioners Joiner and Milner, effective immediately. A.4, 40. (RT 148). Council members Keith and Peyton, who had purchased tires through the Town's account, participated in all of the meetings and in all of the discussions leading up to the council's vote to fire Joiner and Milner, but abstained from the actual vote to fire Joiner and Milner. A.4. (RT 147-148). Mayor Reid testified at trial that he had decided to fire the petitioners sometime prior to the March 29th council meeting. (RT 498).

On April 27, 1984, the petitioners filed their Supplemental Complaint, alleging that they had been discharged by the Town in retaliation for their statements concerning the improper tire purchases by council members Peyton and Keith. The Supplemental Complaint is reprinted at A.40-41. The Supplemental Complaint alleged that the discharge was in violation of petitioners' rights under the First Amendment of the Federal Constitution. A.40.

On December 5, 1984, the petitioners filed their Amended Complaint, alleging that they were "permanent employees" of, and had employment contracts with, the Town of Morris under the Town's personnel policy. A.42, 51-52. The petitioners also alleged, among other things, that the Town's failure to

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[6]Council members Peyton and Keith had made the improper tire purchases.

provide them notice and a hearing prior to being discharged was a violation of their rights of due process under the Fourteenth Amendment of the Federal Constitution, and that the violation gave rise to a cause of action under 42 U.S.C. § 1983. A.42-43. The Amended Complaint is reprinted at A.42-44. The Town's Personnel Policy is reprinted at A.45-56.

At trial, petitioners dismissed their state law claims and proceeded only on their claims under 42 U.S.C. § 1983. A.4. In addition to petitioners' claims under the First Amendment, the trial court submitted the petitioners' Fourteenth Amendment claims to the jury on three theories: (1) that the pay cut was a deprivation of property without due process of law; (2) that the refusal to pay Joiner's family health insurance premiums was a deprivation of property without due process of law; and (3) that petitioners' employment was terminated without due process of law. A.4, 20-25. The due process claims were based upon the Town's failure to provide petitioners with notice of charges and a hearing on those charges before cutting petitioners' pay, eliminating Joiner's family health insurance, and terminating petitioners' employment. A.20-22. The jury returned a general verdict in favor of petitioners, awarding them each $100,000. A.1, 23. The trial court awarded Joiner an additional $25,430 for lost wages and insurance premiums, and Milner an additional $39,034 for lost wages. A.1, 23. The trial court also order the Town to reinstate petitioner Milner. A.1, 23.[7]

[7] Petitioner Joiner dismissed his claim for reinstatement as police chief of the Town of Morris due to a work-related injury he suffered on another job after being terminated by the Town. As a result of the injury, Mr. Joiner became totally and permanently disabled.